

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUNO VAL NOVEL,

Defendant-Appellant.

UNPUBLISHED

May 8, 2012

No. 303286

Wayne Circuit Court

LC No. 10-005227-FH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of identity theft, MCL 445.65, for which he was sentenced to two years' probation. He appeals as of right. We affirm.

I. FACTS AND PROCEEDINGS

Defendant was formerly contracted to act as a sales representative for Access Fleet, Inc., a company that issued fleet cards, a type of credit card used for transactions between businesses. In April 2009, defendant met Michael Scorzo, chief executive officer of Auto Glass of Michigan, d/b/a Harman Glass Doctor ("Harman Glass"), in his capacity as a sales agent for Access Fleet. Harman Glass was a franchise of the Dwyer Group. Defendant obtained personal information from Scorzo, including his social security number and birth date, in order to process Harman Glass's application for Access Fleet services. Defendant subsequently terminated his relationship with Access Fleet and became a sales agent for National Payment Corporation (NPC), a company that provided credit card processing services and leased credit card terminals to interested merchants. In November 2009, defendant submitted to NPC two applications for NPC's leases and services from All Bright Glass and Tint, a company in Ontario. The applications were filled out with Scorzo's personal information, including his name, birth date, and social security number. The form listed Scorzo's cell phone number, with one incorrect digit. Neither Scorzo nor Harman Glass had any affiliation with All Bright Glass, which was not a Dwyer Group franchise.

Defendant provided to NPC a voided check from a checking account that defendant opened with First State Bank on November 5, 2009. The checking account was opened in the name of defendant's corporate entity, Knight Industries, Limited, for which defendant, his brother, and his mother were listed as authorized signatories. The voided check that defendant provided to NPC was No. 98 from a set of starter checks that First State Bank issued, but instead

of listing Knight Industries as the payer, check No. 98 listed Auto Glass of Michigan, Inc., d/b/a All Bright Glass and Tint. The address listed on the check was for a post office box leased by defendant for Knight Industries. Scorzo never authorized defendant to open a bank account or lease a post office box for Harman Glass's business.

II. JURY INSTRUCTIONS

Defendant argues that the trial court gave confusing and misleading jury instructions concerning the elements of identity theft. Although defense counsel had expressed concerns about the jury instructions, especially with respect to the requisite intent, he ultimately agreed to the trial court's resolution of the issue and, after the jury was instructed, he affirmatively stated that he had no objections to the instructions as given. By affirmatively approving the court's instructions, defendant waived this claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). A waiver extinguishes any error, leaving no error to review. *Id.* at 216, 218.

Even if the issue had not been waived, defendant has not established any basis for relief. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). Although defendant contends that the trial court's instructions were confusing and misleading, he fails to explain how they were misleading, other than insinuating that the instructions might have caused the jury to convict him without finding that he possessed the requisite intent. Defendant was charged with violating MCL 445.65. The statute provides that a person shall not "[w]ith intent to defraud or violate the law" use another person's personal identifying information to (1) "obtain credit, goods, services, money, property, a vital record, a confidential telephone record, medical records or information, or employment," or (2) "commit another unlawful act." The trial court instructed the jury that a person shall not use another person's identifying information "*with intent to defraud or violate the law* to either obtain credit, goods, services, money, or employment." The trial court's instruction accurately conveyed the requisite criminal intent required by the statute. Accordingly, there was no error.

Defendant also argues that the trial court erred by failing to instruct the jury on the defense of mistake. We agree with the trial court that the evidence did not support the requested instruction. Therefore, the trial court did not err by failing to give it. *People v Weeder*, 469 Mich 493, 499 n 3; 674 NW2d 372 (2004). Furthermore, as indicated previously, the trial court instructed the jury that, in order to find defendant guilty, it was required to find that he acted with the "intent to defraud or violate the law." The court's instruction sufficiently protected defendant's rights because it precluded a conviction on the basis of a mistake, made without any intent to defraud or violate the law. *Chapo*, 283 Mich App at 373.

III. JUDICIAL MISCONDUCT

Defendant next argues that the trial court's comments and questioning of witnesses during trial pierced the veil of judicial impartiality and denied him a fair trial. Defendant failed to preserve this issue by objecting to the allegedly improper comments and questions at trial. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Claims of judicial misconduct are reviewed to determine whether the trial court's comments or conduct evidenced partiality that could have influenced the jury to a party's detriment. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A trial court is permitted to question a witness to clarify testimony or elicit additional relevant testimony. *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996). The court may not, however, pierce the veil of judicial impartiality by engaging in conduct or making comments that might unduly influence the jury and deprive a party of his right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). The test is whether the judge's questions might have "unjustifiably aroused suspicion in the mind of the jury" regarding a witness's credibility, and whether the judge's partiality "quite possibly could have influenced the jury to the detriment of defendant's case." *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992) (citations and internal quotations omitted).

The record does not indicate that the trial court's questions and comments clearly pierced the veil of judicial impartiality. The trial court's comment that Scorzo "may have been right" in his determination that fraud explained how his personal information appeared on the NPC application was not intended as a comment that Scorzo was correct, but a response to defense counsel's objection that Scorzo's answer was an improper conclusion. The court qualified its statement by stating that Scorzo would be allowed to explain how he arrived at his conclusion. The trial court properly redirected the prosecutor's question to Lori Reese when defense counsel objected that the question regarding Reese's investigation of check No. 98 was leading. The trial court's involvement in questioning Reese about what she learned about the discrepancies surrounding the voided check did not improperly elevate Reese to an expert witness. Reese was not testifying about any matter that required expert testimony. She was testifying about her own investigation and explained that she tried to investigate the check by determining if there were any discrepancies in the corporation's registered name, the name the corporation used for doing business, the tax ID number, and other information involving matters of ordinary knowledge. The court's questioning did not clearly convey that the court had an opinion concerning the credibility of Reese's testimony. The trial court's questions to defendant also were not clearly improper. The court's questions were intended to elicit clarifying information because defendant's testimony was not fully responsive to the questions asked. The court's questions did not have the clear effect of piercing the veil of judicial impartiality. Accordingly, there was no plain error.

Further, to the extent that the trial court's comments or questions could be perceived as improper, the court instructed the jury that its "comments, rulings, questions, and instructions are not evidence" and that

when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. And if you believe that I have an opinion about how you should decide the case, then pay no attention to what you think that opinion is. You are the only judges of the facts and you must decide this case only from the evidence.

The court's instruction was sufficient to protect defendant's substantial rights, and the jury is presumed to have followed its instructions. *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 676 (2011).

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan